

1
2
3
4
5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

7 IN RE: TFT-LCD (FLAT PANEL) ANTITRUST
LITIGATION

No. M 07-1827 SI
MDL No. 1827

9 || This Order Relates To:

No. C 10-3619 SI

10 STATES OF MISSOURI, ARKANSAS,
11 MICHIGAN, WEST VIRGINIA, AND
WISCONSIN.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

13 v. Plaintiffs,

14 || AU OPTRONICS CORPORATION, *et al.*,

Defendants.

17 On February 18, 2011, the Court heard argument on defendants' motion to dismiss plaintiffs'
18 complaint. Having considered the arguments of counsel and the papers submitted, the Court hereby
19 GRANTS in part and DENIES in part defendants' motion to dismiss.

BACKGROUND

22 On August 17, 2010, plaintiff States of Missouri, Arkansas, Michigan, West Virginia, and
23 Wisconsin (collectively “plaintiffs” or the “States”), through their individual Attorneys General, filed
24 in this Court a joint complaint against numerous domestic and foreign defendants for violations of state
25 and federal antitrust laws and state unfair trade practices law. Pursuant to this Court’s July 3, 2007
26 pretrial order No. 1, the case was designated as related to MDL No. 1827, M 07-1827.

27 The complaint alleges a global price-fixing conspiracy by suppliers of thin-film transistor liquid
28 crystal display (“TFT-LCD”) panels. Plaintiffs allege that “[a] conspiracy to suppress and eliminate

1 competition among manufacturers of TFT-LCD Panels by fixing prices and limiting the production of
2 the panels existed from at least 1999 through at least 2006 (the ‘Conspiracy Period’).” Compl. ¶ 4.
3 Plaintiffs allege that defendants violated the Sherman and Clayton Acts as well as numerous state
4 antitrust, consumer protection, and trade laws. Plaintiffs assert these claims “on behalf of themselves,
5 their governmental entities, and/or other purchasers residing therein, and their general economies.” *Id.*
6 ¶ 10.

7 Defendants move to dismiss the complaint on five grounds: (1) the four states that assert claims
8 on behalf of state or local governmental entities fail to adequately identify those entities; (2)
9 disgorgement is not available as a remedy under either federal or state law; (3) Michigan and Wisconsin
10 failed to adequately plead the identity of the assignors or which purchases took place in each state; (4)
11 Arkansas’ state deceptive trade practices claim is barred, as are any of Arkansas’ state unfair practices
12 claims that are based on indirect purchases made prior to April 8, 2003; and (5) Missouri’s state
13 merchandising practices claim is not pled with adequate particularity and fails to allege a statutory
14 element.

16 **LEGAL STANDARD**

17 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint that
18 fails to state a claim upon which relief may be granted. To survive a Rule 12(b)(6) motion to dismiss,
19 the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
20 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff
21 to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.”
22 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). While courts do not require “heightened fact pleading
23 of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative
24 level.” *Twombly*, 550 U.S. at 544, 555.

25 In deciding whether the plaintiff has stated a claim upon which relief may be granted, the Court
26 must assume that the plaintiff’s allegations are true and must draw all reasonable inferences in the
27 plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the
28 Court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions

1 of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

2 If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The
3 Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request
4 to amend the pleading was made, unless it determines that the pleading could not possibly be cured by
5 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal
6 quotation marks omitted).

7

8

DISCUSSION

I. Identification of unnamed state or local government entities

Michigan, Missouri, West Virginia and Wisconsin bring Sherman Act and state law claims on
behalf of a variety of unnamed state entities, including state agencies, schools and municipalities. *See*
e.g., Compl. ¶ 133 (Missouri alleging claims on behalf of “itself, its political subdivision and public
agencies, and all other political subdivisions, school districts and municipalities”); *Id.* ¶¶ 16, 128
(Michigan suing on behalf of “itself and its State Agencies”). Defendants move to dismiss these claims
on the ground that they fail to provide fair notice of the States’ claims as required by Rule 8(a).
Defendants argue that the complaint’s failure to identify the state entities creates four potential forms
of prejudice: (1) defendants are unable to identify relevant sales of LCD products and panels; (2)
defendants cannot determine whether they have contractual defenses against the state entities’ claims;
(3) the failure to identify the entities muddies the question of precisely which entities will be bound by
the judgment in this case; and (4) defendants are unable to determine whether the States have the legal
right to represent the entities.

The States argue that they are not required to specifically identify the state entities in the
complaint, and that defendants can admit or deny the allegations in the complaint without additional
information about the state entities. The States assert that they all have “automatic” authority under
state law to bring claims on behalf of local and State entities, thus distinguishing the case cited by
defendants, *New York v. Cedar Park Concrete Corporation*, 665 F. Supp. 238, 241 (S.D.N.Y. 1987)
(dismissing complaint with leave to amend where complaint did not allege compliance with statute
providing that State of New York could only bring suit on behalf of state entities if the entities expressly

1 requested such representation).¹ In addition, the States assert that “all or nearly all of the identities of
2 the state agencies and other governmental entities for which damages are sought by the States have
3 already been disclosed.” Combined Opp’n at 2:7-9.

4 The relevant question at this stage of the proceedings is whether the complaint “answer[s] the
5 basic questions: who, did what, to whom (or with whom), where, and when.” *Kendall v. Visa U.S.A.,*
6 *Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008). This complaint meets this standard because the States have
7 the authority to bring this action on behalf of governmental entities. The complaint is sufficient as a
8 pleading matter and the information that defendants seek regarding the specific nature of the purchasing
9 agreements or the scope of the claims can be sought in discovery.

10 The Court DENIES defendants’ joint motion to dismiss Michigan, Missouri, West Virginia and
11 Wisconsin’s claims under Rule 8(a).

12

13 **II. Disgorgement**

14 Count I of the complaint alleges violations of federal antitrust law, and seeks an injunction and
15 “other equitable relief, including disgorgement.” Compl. ¶ 115. Defendants move to strike the request
16 for disgorgement, contending that disgorgement is not authorized by the Clayton Act. Defendants argue
17 that the Clayton Act authorizes money “damages” as well as “injunctive relief . . . against threatened
18 loss or damage,” 15 U.S.C. §§ 15(a), 15c(a), 26, and that disgorgement qualifies as neither. Defendants
19 also argue that permitting the States to seek disgorgement based on indirect purchases under the Clayton
20 Act would contravene *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

21 Defendants also move to strike the requests for disgorgement under the state antitrust statutes.
22 In the complaint, Missouri requests “other equitable relief, including disgorgement,” under the Missouri
23 Antitrust Act. Compl. ¶ 136. Defendants contend that disgorgement is not an available remedy under
24 the Missouri antitrust statute because that statute provides that it “shall be construed in harmony with
25 ruling judicial interpretations of comparable federal antitrust statutes.” Mo. Rev. Stat. § 41.031.

26

27 ¹ *State of Alaska v. Chevron Chemical Company*, 669 F.2d 1299 (9th Cir. 1982), also cited by
28 defendants, does not address the sufficiency of the pleadings, but rather whether the State of Alaska had
standing to sue.

1 In response to defendants' motion, plaintiffs state that they "hereby withdraw their request for
2 relief under the disgorgement theories set forth in the complaint. The Plaintiff States continue to pursue
3 monetary relief in the form of damages and/or restitution." Combined Opp'n at 4:3-5. Accordingly,
4 the Court GRANTS defendants' motion to strike the requests for disgorgement.²

5

6 **III. Identity of assignors in direct and indirect purchaser antitrust claims**

7 The complaint alleges that Michigan and Wisconsin bring federal and state antitrust claims as
8 assignees of direct and indirect purchasers. The assigned claims arise from purchases made by
9 contractors who in turn sold the goods to the States. The assignments derive from Michigan and
10 Wisconsin policies that require vendors who sell goods or services to either State to assign antitrust
11 claims to the respective State. Defendants move to dismiss these claims because they neither identify
12 the assignors of plaintiffs' claims, nor allege sufficient facts to demonstrate that the assignors would be
13 entitled to relief. Defendants contend that they need to know the identities of the assignors, information
14 regarding the purchase contracts that gave rise to the assignment, and information regarding whether
15 the relevant purchases were made in Michigan and Wisconsin. Defendants claim that they contacted
16 the Michigan and Wisconsin Attorneys General and requested information regarding the identity of the
17 assignors and copies of the purchase contract, but that those requests were denied.

18 Citing *In re K-Dur Antitrust Litigation*, 338 F. Supp. 2d 517 (D.N.J. 2004), the States argue that
19 they need not identify assignors in the complaint. In *K-Dur*, the Commonwealth of Pennsylvania
20 asserted claims "on behalf of the Commonwealth's general economy, as *parens patriae* on behalf of
21 natural persons in the Commonwealth, and in its proprietary capacity on behalf of departments, bureaus,
22 and agencies of the Commonwealth, who purchased K-Dur products." *K-Dur*, 338 F. Supp. 2d. at 523.

23

24 ² In their reply, defendants assert that to the extent plaintiffs seek restitution under the Clayton
25 Act, that request should also be stricken because restitution is unavailable under federal antitrust law
26 for the same reasons that disgorgement is unavailable. *See In re Multidistrict Vehicle Air Pollution*, 538
27 F.2d 231, 234 (9th Cir. 1976). The complaint does not actually seek restitution under federal law.
28 However, the Court agrees that such a request would be barred. *See id.* Similarly, defendants' reply
argues that restitution is not available under the state antitrust statutes, and that those requests must be
stricken because the state antitrust statutes must be interpreted in harmony with the Sherman Act.
Plaintiffs did not address this issue in their papers. If, in the amended complaint, the States wish to seek
restitution under the state antitrust statutes, the amended complaint shall cite authority showing that such
a remedy is available under those statutes.

1 The defendants argued “that the assigned claims . . . are deficient because they all have failed to allege
 2 payment of consideration for the assignments, and with respect to the Commonwealth, have failed to
 3 identify the identity of the assignors who allegedly assigned their claims.” *Id.* at 539. The court held
 4 that “[t]he gravamen of Defendants’ contention is that the ‘assignee’ Plaintiffs should have pled
 5 additional facts to show that their asserted claims were validly assigned” and characterized these
 6 arguments “as raising an issue of the Plaintiffs’ capacity to sue.” *Id.* at 540. The court denied the
 7 defendants’ motion to dismiss, holding that “[a] complaint will not be dismissed for lack of pleading
 8 a party’s capacity to sue except where lack of capacity affirmatively appears on the face of the
 9 complaint, or where an opposing party has made a specific negative averment in a responsive pleading.”
 10 *Id.* (citations omitted).

11 Given the complexity of this MDL and the fact that the assigned claims overlap to some degree
 12 with claims alleged by other plaintiffs in this MDL, the Court finds it appropriate to require the States
 13 to identify the assignors and GRANTS defendants’ motion to this extent and GRANTS plaintiffs leave
 14 to amend. Here, unlike *K-Dur*, defendants’ challenge to the complaint is not solely related to capacity
 15 to sue. The balance of the information sought by defendants, such as information about the contracts,
 16 is not required as a pleading matter and can be explored in discovery.³

18 **IV. State law deceptive and unfair trade practice claims**

19 **A. Arkansas Deceptive Trade Practices Act**

20 Arkansas has alleged a claim under the Arkansas Deceptive Trade Practices Act (“ADTPA”),
 21 Ark. Code Ann. § 4-75-309. The ADTPA prohibits ten specific practices, as well as “[e]ngaging in any
 22 other unconscionable, false, or deceptive act or practice in business, commerce, or trade.” Ark. Code

23
 24 ³ Defendants also argue insofar as the States assert assigned claims under their state antitrust
 25 claims, the States must allege that the assigned purchases took place within Michigan and Wisconsin.
 26 The States respond that this allegation has been made in the complaint: “In the States of Michigan and
 27 Wisconsin, state entities bought TFT-LCD products” Compl. ¶ 104. However, this allegation
 28 speaks only to the States’ purchases, not the original purchases that give rise to the assigned claims.
 This Court has previously held that in order to invoke the various state antitrust laws at issue, plaintiffs
 must be able to allege that the occurrence or transaction giving rise to the litigation – plaintiffs’
 purchases of allegedly price-fixed goods – occurred in the various states. Consistent with this Court’s
 prior decisions, the Court holds that in order to bring the assigned claims under the state antitrust laws,
 Michigan and Wisconsin must allege that the purchases were made in Michigan and Wisconsin.

1 Ann. § 4-88-107(a)(10). Arkansas alleges that defendants' price-fixing conduct constitutes an
2 "unconscionable" act in business, commerce or trade under the ADTPA, giving rise to a claim for
3 restitution. Compl. ¶¶ 124, 126.

4 Defendants move to dismiss this claim, contending that the ADTPA does not apply to price-
5 fixing. Defendants note that this Court previously dismissed the indirect purchaser plaintiffs' attempt
6 to state a claim on behalf of Arkansas consumers under the ADTPA. *See In re TFT-LCD (Flat Panel)*
7 *Antitrust Litig.*, 586 F. Supp. 2d 1109, 1125 (N.D. Cal. 2008). In that order, the Court noted the absence
8 of any Arkansas authority interpreting the ADTPA to apply to price-fixing, and in the absence of any
9 such authority, the Court declined to adopt the plaintiffs' expansive interpretation of the statute.

10 Defendants also note that Arkansas has alleged a separate price-fixing claim under the Arkansas
11 Unfair Practices Act, Ark. Code Ann. § 44-75-201 *et seq.* ("AUPA"), which codified Arkansas antitrust
12 law. Defendants argue that nothing in the general language of the ADTPA indicates that the statute was
13 intended to apply to price-fixing, which is specifically addressed by the AUPA, and that interpreting the
14 ADTPA to encompass such claims would be contrary to the implied intent of the Arkansas legislature.

15 Arkansas acknowledges that no Arkansas state or federal court has held that the ADTPA applies
16 to price-fixing. However, Arkansas asserts that "few antitrust cases are litigated in Arkansas, and there
17 is scant Arkansas authority on many topics within the antitrust arena." Arkansas Opp'n at 9:3-5.
18 Arkansas argues that the Court should be guided by Arkansas courts' liberal construction of the
19 ADTPA. The Arkansas Supreme Court has affirmed a lower court's finding that an unconscionable act
20 is "an act that 'affronts the sense of justice, decency, or reasonableness,' " including acts "violative of
21 public policy or a statute." *Baptist Health v. Murphy*, 226 S.W.3d 800, 811 & n.6 (Ark. 2006) (holding
22 that a hospital's policy of denying privileges to physicians holding ownership interests in competing
23 hospitals was properly determined by the trial court to be unconscionable under the ADTPA); *see also*
24 *State ex rel. Bryant v. R & A Investment Co.*, 985 S.W.2d 299, 302 (Ark. 1999) (holding that the
25 ADTPA's catch-all provision on unconscionable practices "illustrates that liberal construction" of the
26 statute "is appropriate").

27 Arkansas has also cited several district court decisions from outside of Arkansas, including Judge
28 Hamilton's decision in *In re Dynamic Random Access Memory Antitrust Litig.* and Judge Armstrong's

1 decision in *In re Flash Memory Antitrust Litig.*, which have held that the ADTPA applies to price-fixing
2 claims. *See In re Dynamic Random Access Memory Antitrust Litig.*, 516 F. Supp. 2d 1072, 1108-09
3 (N.D. Cal. 2007); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1156-57 (N.D. Cal. 2009).

4 In response, defendants have cited several other district court decisions from outside of
5 Arkansas, including Judge Wilken's decision in *In re Static Random Access Memory Antitrust Litig.* and
6 Judge Alsup's decision in *In re Graphics Processing Units Antitrust Litig.*, holding that the ADTPA
7 does not apply to price-fixing claims. *See In re Static Random Access Memory Antitrust Litig. (SRAM)*,
8 No. 07-md-0819 CW, 2010 WL 5094298 (N.D. Cal. Dec. 8, 2010); *In re Graphics Processing Units*
9 *Antitrust Litig.*, 527 F. Supp. 2d 1011 (N.D. Cal. 2007).

10 In light of this split among federal authorities, and the lack of any cases from Arkansas state or
11 federal courts recognizing a price-fixing claim under the ADTPA, this Court declines to reconsider its
12 previous holding.⁴ Accordingly, the Court GRANTS defendants' motion to dismiss Arkansas' claim
13 under the ADTPA.

14

15 **B. Arkansas Unfair Practices Act**

16 Arkansas alleges a claim under the AUPA in its role as *parens patriae*, on behalf of both direct
17 and indirect purchasers residing in Arkansas. Defendants move to dismiss the AUPA claims to the
18 extent they are based on conduct that took place prior to April 8, 2003, the date on which Arkansas'
19 *Illinois Brick* repealer statute, Arkansas Code Annotated section 4-75-315 ("section 4-75-315"), was
20 enacted. Defendants cite *City of Cave Springs v. City of Rogers*, 37 S.W.3d 607 (Ark. 2001), for the
21 proposition that "[t]he general rule is that all legislation is presumed to apply prospectively unless the
22 legislature expressly declares, or necessarily implies by the language used, an intent to give a statute
23 retroactive effect." *Id.* at 612. Defendants argue that section 4-75-315 does not contain any such
24 language, and thus that the statute only applies to claims relating to conduct that took place after April
25

26 ⁴ Arkansas asserts that "[t]his Court can confidently predict that the Arkansas Supreme Court
27 would hold that the ADTPA prohibits price fixing." However, "In assessing how a state's highest court
would resolve a state law question – absent controlling state authority – federal courts look to existing
state law without predicting potential changes in that law." *See Ticknor v. Choice Hotels Int'l, Inc.*, 265
28 F. 3d 931, 939 (9th Cir. 2001).

1 8, 2003.⁵

2 Arkansas argues that although section 4-75-315 does not contain any language that “expressly
 3 declares, or necessarily implies” that the section was intended to apply retrospectively, another section
 4 of the AUPA does contain such language. Arkansas cites Arkansas Code Annotated section 4-75-
 5 320(c), which reads: “This section is not intended to allow for the commencement of any action by the
 6 Attorney General under the provisions of this subchapter for events occurring prior to the enactment of
 7 this section of which the Attorney General had actual knowledge.” Arkansas argues that it is clear that
 8 the Arkansas General Assembly intended for Section 4-75-315 to apply retroactively when that
 9 provision is read in tandem with Section 4-75-320(c). Arkansas relies on *California v. Infineon*
 10 *Technologies AG*, 531 F. Supp. 2d 1124 (N.D. Cal. 2007), where Judge Hamilton held,

11 [T]he 2003 version of the Arkansas antitrust statute – including its amendments – does
 12 not explicitly apply only to violations occurring after its enactment. Rather, the
 13 Arkansas statute elsewhere merely indicates that it does not “allow for the
 14 commencement of any action by the Attorney General under the provisions of [the Act]
 15 for events occurring prior to [April 8, 2003] of which the Attorney General had actual
 knowledge.” *See Ark. Code Ann. § 4-75-320(c)*. Thus, as plaintiffs argue, a fair reading
 of the amended statute is that it applies to actions commenced by the Attorney General
 that allege conduct occurring prior to April 8, 2003, but only where the Attorney General
 had no actual knowledge of the conduct at the time.

16 531 F. Supp. 2d at 1143.

17 Defendants, in turn, direct the Court to *In re Relafen Antitrust Litig.*, 225 F.R.D. 14, 26 (D. Mass.
 18 2004), and *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline PLC*, 737 F.
 19 Supp. 2d 380, 429-30 (E.D. Pa. 2010). In *Relafen*, the court held that section 4-75-315 “effectuate[d]
 20 a change in [state] law” and “increase[d] a party’s liability for past conduct.” *Relafen*, 225 F.R.D. at
 21 26 (internal citations omitted). The court held that giving section 4-75-315 retroactive application
 22 would violate “[e]lementary considerations of fairness, which dictate that individuals should have an
 23 opportunity to know what the law is and to conform their conduct accordingly.” *Id.* (internal quotations
 24

25 ⁵ The AUPA consists of Arkansas Code Annotated sections 4-75-201 through 4-75-320. The
 26 *Illinois Brick* repealer statute, a subsection of the AUPA, was drafted in response to the Supreme Court’s
 27 ruling in *Illinois Brick* and was designed to permit both direct and indirect purchasers to bring suit under
 28 Oregon’s antitrust laws. Ark. Code Ann. § 4-75-315; *see also* 2003 Arkansas Laws Act 1172 (H.B.
 2720), AR LEGIS 1172 (2003) (explaining that the 2003 amendments to the AUPA were enacted
 because the Arkansas Attorney General was “unable to adequately protect the consumers . . . for harm
 they have suffered as indirect purchasers.”).

1 omitted). With regard to section 4-75-320(c), the *Relafen* court stated that it “[d]ecline[d] to apply the
 2 statutes [retroactively] absent a clearer expression of retroactive reach.” *Id.* The *Sheet Metal Workers*
 3 court adopted the reasoning of *Relafen* without a separate analysis of section 4-75-320(c). *See Sheet*
 4 *Metal Workers*, 737 F. Supp. 2d at 429-30.

5 This Court applies the Arkansas rules of statutory construction when interpreting Arkansas
 6 statutes. *See In re Anderson*, 824 F.2d 754, 756 (9th Cir. 1987). Under Arkansas law, the Court is
 7 required to “construe the statute so that no word is left void, superfluous, or insignificant; and meaning
 8 and effect are given to every word in the statute if possible.” *Barclay v. First Paris Holding Co.*, 42
 9 S.W.3d 496, 500 (Ark. 2001). Applying these principles, the Court agrees with Judge Hamilton’s
 10 interpretation that section 4-75-320(c) makes section 4-75-315 retroactive. The Court finds that Section
 11 4-75-320(c) “necessarily implies that by the language used,” an intent to give section 4-75-315
 12 retroactive application. Defendants’ interpretation of section 4-75-320(c) does not give meaning to the
 13 language precluding the Attorney General from maintaining a lawsuit for events occurring prior to April
 14 2003 if the Attorney General had actual knowledge of those events. Accordingly, this Court finds that
 15 Arkansas’ claims based on conduct that occurred prior to April 8, 2003 are governed by section 4-75-
 16 315 provided Arkansas alleges that the Attorney General was unaware of the relevant alleged conduct,
 17 which Arkansas has done. *See* Compl. ¶ 120. Accordingly, the Court DENIES this aspect of
 18 defendants’ motion to dismiss the complaint.⁶

20 C. Missouri Merchandising Practices Act

21 Missouri alleges a claim under the Missouri Merchandising Practices Act (“MMPA”). As
 22 relevant here, the MMPA prohibits

23 [t]he act, use or employment by any person of any deception, fraud, false pretense, false
 24 promise, misrepresentation, unfair practice or the concealment, suppression, or omission
 25 of any material fact in connection with the sale or advertisement of any merchandise in
 26 trade or commerce . . . in or from the state of Missouri

27 ⁶ Arkansas also argues that the presumption against retroactivity does not apply where a
 28 statute’s effect is remedial, and that this statute is in fact remedial. Because the Court finds that section
 4-75-320(c) permits retroactive application of section 4-75-315, it does not address Arkansas’ argument
 regarding the statute’s remedial nature.

1 Mo. Rev. Stat. § 407.020.1.

2 The complaint alleges, in relevant part:

3 From at least 1999 until the present, Defendants . . . have engaged in the act, use and
4 employment of deception, fraud, false pretense, false promise, misrepresentation, unfair
5 practice, and the concealment, suppression, and omission of material facts in connection
6 with the advertisement, offering for sale, and sale of merchandise, all in violation of [the
7 MMPA], to wit:

- 8 a) Engaging in deception . . . that tended to create false impressions as to the value
9 . . . of TFT-LCD panels . . . ;
- 10 b) Engaging in misrepresentation . . . and in half-truths . . . by stating as reasons for
11 price increases and the absence of price reductions in TFT-LCD panels assertions
12 which were not in accord with the facts . . . ;
- 13 c) Engaging in concealment, suppression or omission of material facts . . . ;
- 14 d) Engaging in unfair practices . . . by participating in agreements to restrain trade
15 . . . which agreements offend public policy . . . [and] are unethical, oppressive,
16 and unscrupulous . . . ;
- 17 e) Engaging in unfair practices . . . by participating in agreements to restrain trade
18 . . . which agreements violate [state and federal laws] . . . intended to protect the
19 public . . . ; and
- 20 f) Engaging in unfair practices . . . by violating the duty of good faith by failing to
21 adhere to honesty in fact and observing reasonable commercial standards of fair
22 dealing

23 Compl. ¶ 143. The next paragraph of the complaint alleges, “While unnecessary for establishing civil
24 liability under the Merchandising Practices Act, the foregoing acts and practices were done knowingly
25 and with the intent to defraud, and in a manner to avoid detection by purchasers of TFT-LCD panels and
26 products within Missouri and caused the State of Missouri and resident purchasers to pay supra-
27 competitive, artificially inflated prices for TFT-LCD products and to be deprived of free, open and fair
28 competition in the sale of TFT-LCD panels.” *Id.* ¶ 144.

29 1. Rule 9(b)

30 Defendants move to dismiss Missouri’s claim under the MMPA on the ground that the claim is
31 not pled with particularity as required by Rule 9(b). Defendants argue that Missouri’s MMPA claim
32 alleges fraud, and therefore it must plead the time, place, and contents of false representations, as well
33 as the identity of the person making the misrepresentation, and what was obtained or given thereby.

1 Missouri argues that fraud is not an element of a claim under the MMPA, and thus that Missouri
2 is not required to plead its MMPA claim with particularity under Rule 9(b). Missouri cites a number
3 of cases for the assertion that the MMPA prohibits a variety of actions that are not by their nature
4 fraudulent, and that “[i]t is not necessary to prove the elements of common law fraud in order to
5 establish a violation of the MMPA.” *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712,
6 176 (Mo. App. E.D. 2008); *Ullrich v. CADCO, Inc.*, 244 S.W.3d 772, 777 (Mo. App. E.D. 2008) (“[A]
7 claim alleging violations of the MMPA does not necessarily need to be stated with the same particularity
8 as a claim of common law fraud or mistake.”); *see also State ex rel. Webster v. Areaco Inv. Co.*, 756
9 S.W.2d 633, 635 (Mo. App. E.D. 1988). Missouri argues that fraud is not essential to any of the six
10 MMPA claims alleged in Paragraph 143(a)-(f), and that Missouri therefore was not required to allege
11 its MMPA claims with particularity. Alternatively, Missouri asserts that even if the allegations
12 contained in Paragraph 143(a)-(c) – the three specific allegations addressed in defendants’ motion –
13 allege fraud, those allegations satisfy Rule 9(b).

14 “In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless
15 to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the
16 plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct
17 as the basis of a claim. In that event, the claim is said to be ‘grounded in fraud’ or to ‘sound in fraud,’
18 and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).” *Vess*
19 *v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1103-04 (9th Cir. 2003). In contrast, “a plaintiff may
20 choose not to allege a unified course of fraudulent conduct in support of a claim, but rather to allege
21 some fraudulent and some non-fraudulent conduct. In such cases, only the allegations of fraud are
22 subject to Rule 9(b)’s heightened pleading requirements.” *Id.* at 1104.

23 Here, although Missouri asserts that it is not relying on fraud as a basis of its MMPA claim,
24 Paragraph 144 of the complaint alleges that “[w]hile unnecessary for establishing civil liability under
25 the [MMPA], the foregoing acts and practices were done knowingly and with the intent to defraud”
26 The “foregoing acts and practices” are all of the specific violations of the MMPA alleged in
27 Paragraph 143. Thus, although Missouri characterizes its MMPA claim as not being based on fraud or
28 alleging a unified course of fraudulent conduct, the allegations of Paragraph 144 suggest otherwise. The

1 Court will GRANT Missouri leave to amend the MMPA claim to clarify the nature of its allegations.
2

3 **2. Geographic nexus with Missouri**

4 Defendants also move to dismiss the MMPA claim on the ground that the complaint fails to
5 allege a sufficient geographic nexus with Missouri. Defendants argue that the complaint is deficient
6 because Missouri does not allege that any defendant sold any merchandise in Missouri trade or
7 commerce, nor does Missouri allege that defendants made any misleading statements in, from, or to
8 Missouri.

9 The MMPA prohibits deceptive or unfair practices “in connection with the sale or advertisement
10 of any merchandise in trade or commerce . . . in or from the state of Missouri.” Mo. Rev. Stat.
11 § 407.020.1. The MMPA broadly defines “trade or commerce” as,

12 [T]he advertising, offering for sale, sale, or distribution, or any combination thereof, of
13 any services and any property, tangible or intangible, real, personal, or mixed, and any
14 other article, commodity, or thing of value wherever situated. The terms “trade” and
“commerce” include any trade or commerce directly or indirectly affecting the people
of this state.

15 Mo. Rev. Stat. § 407.010(7).

16 Missouri has alleged that defendants’ actions “fail[ed] to adhere to honesty in fact and . . .
17 reasonable commercial standards of fair dealing in connection with the sale of TFT-LCD panels and
18 products to purchasers within the State of Missouri” and thereby “caused the State of Missouri and
19 resident purchasers to pay supra-competitive, artificially inflated prices for TFT-LCD products . . .”
20 Compl. ¶¶ 143(f)-144. The Court finds that these allegations are sufficient as a pleading matter.
21 Defendants have not cited any cases holding that in order to state a claim under the MMPA, a plaintiff
22 must allege that the defendant’s conduct occurred in Missouri. Rather, courts have applied the MMPA
23 where the defendant’s conduct causes *injury* to Missouri residents. *See State ex rel. Nixon v. Estes*, 108
24 S.W.3d 795, 800 (Mo. W.D. 2008) (“In our view, the definition of trade or commerce in the second
25 sentence of section 407.010(7) simply makes clear the intent of the General Assembly that the terms
26 should be understood to include, but not necessarily be limited to, economic activity which has a direct
27 or indirect effect on the people of this state.”); *cf. Gibbons v. Nuckolls, Inc.*, 216 S.W.3d 667, 669 (Mo.
28 2007) (privity not required under the MMPA and therefore consumer who indirectly purchased product

1 could sue wholesaler). Accordingly, the Court DENIES defendant's motion to dismiss Missouri's
2 MMPA claim on this ground.

3

4 **CONCLUSION**

5 For the foregoing reasons, defendants' motion to dismiss is GRANTED in part and DENIED
6 in part. (Docket No. 2172 in M 07-1827 and Docket No. 20 in C 10-3619). The amended complaint
7 must be filed by **April 29, 2011**.

8

9 **IT IS SO ORDERED.**

10
11 Dated: April 11, 2011

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28



SUSAN ILLSTON
United States District Judge